Majlis Agama Islam Selangor v Bong Boon Chuen & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–53 OF 2008
RAUS SHARIF, HASAN LAH AND ABDUL MALIK ISHAK, JJCA
2 SEPTEMBER 2008

Administrative Law — Remedies — Judicial review — Leave to intervene into judicial review proceedings — Whether issue raised to intervene was just and convenient to determine within judicial review proceedings

Civil Procedure — Intervention — Application for — Leave to intervene into judicial review proceedings — Whether proper to go by way of O 15 r 6(2) of Rules of the High Court 1980 — Whether requirements for intervention satisfied — Whether issue raised to intervene was just and convenient to determine within judicial review proceedings

This was an appeal against the decision of Shah Alam High Court dismissing the Majlis Agama Islam Selangor's ('MAIS') application for leave to intervene into the judicial review proceedings filed by the owners of the residential units in Kota Kemuning and Kemuning Greenville, Shah Alam, Selangor ('the applicants'). The applicants sought at the High Court, inter alia, to review the decision of Majlis Bandaraya Shah Alam's ('MBSA') in allowing a vacant land in Kota Kemuning, Shah Alam, Selangor to be used as a Muslim burial ground. MAIS's application to intervene was based on the fact that MAIS had commenced an action in the Shariah High Court, Shah Alam for a declaration that the vacant land was a *wakaf* land, and the Shariah High Court of having an exclusive jurisdiction to decide on the issue of *wakaf*. MAIS's application for leave to intervene was filed in pursuant O 15 r 6(2)(b) of the Rules of the High Court 1980 ('RHC'). The learned High Court judge held that O 15 r 6(2) of the RHC was applicable to judicial review proceedings. However, she went on to hold that MAIS had failed to satisfy the requirements of O 15 r 6(2) of the RHC and that there was no necessity for MAIS to be joined as an intervener. Accordingly, the application was dismissed.

Held, dismissing the appeal with costs:

(1) (per **Raus Sharif JCA**, **Hasan Lah JCA** concurring) Under the RHC,

A the applications for judicial review were governed by O 53 and not O 15 r 6(2) of the RHC. O 53 provides for the parties wanting to be heard on matters in issue, in judicial review proceedings. Thus, there was no necessity for MAIS to be made as a party in order to be heard and support the impugned decision of MBSA (see O 53 r 8(1)) (see para 8).

B (2) (per **Raus Sharif JCA**, **Hasan Lah JCA** concurring) In the present case, the applicants sought to impugn the decision of MBSA in approving the said vacant land to be used as a burial ground. In such proceedings, only the decision making process of MBSA would be under scrutiny ie whether the decisions made by MBSA were administratively sound. The C High Court would not substitute its own decision. In fact, it could not do so, as the orders that might be ordered in judicial review proceedings were limited. Thus, there was no necessity for MAIS to be joined as an intervener to the judicial review proceedings (see para 10).

D (3) (per **Raus Sharif JCA**, **Hasan Lah JCA** concurring) Further, MAIS had failed to satisfy its requirements, as the *wakaf* issue that was raised was not one that was just and convenient to determine within the judicial review proceedings. In fact, it was wholly unrelated to the core issue sought by the applicants in the judicial review proceedings and thus E would constitute an attempt to introduce an entirely independent and new cause into a judicial review proceedings, which was not permissible under O 15 r 6(2)(b) of RHC (see para 11).

(4) (per **Abdul Malik Ishak JCA** dissenting) MAIS ought to have been F given leave to intervene in the judicial review proceedings in order to support the decision of Majlis Bandaraya Shah Alam to set aside the 13.54 acres of land for the Muslim burial ground. MAIS's intervention was also important in order to ensure that the Shariah High Court proceedings at Shah Alam for, inter alia, a declaration that the 13.54 G acres of land is a *wakaf* land and that it be registered under Enakmen Wakaf (Negeri Selangor) 1999 would not be rendered otiose (Para 115).

(5) (per **Abdul Malik Ishak JCA** dissenting) the articles referred to on *wakaf* and the definition of the word as set out in s 2(1) of the Enactment 2003 serve as a reminder that *wakaf* is not an easy subject H to handle bearing in mind that it is a live issue before the civil and the Shariah High Court at Shah Alam. The views of the 'ulamas' or Muslim scholars on *wakaf* would greatly assist the civil High Court at Shah Alam to arrive at a just decision in the judicial review proceedings and this could only be achieved if MAIS was allowed to intervene as I otherwise it is an affront to justice. MAIS would play a prominent role in that it would cushion the sensitivity of the case in the event the civil High Court at Shah Alam makes an order that the bodies of the deceased Muslims who had been buried in the 13.54 acres of land be exhumed (para 126 & 141).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi Shah Alam yang menolak permohonan Majlis Agama Islam Selangor ('MAIS') bagi kebenaran untuk mencelah di dalam prosiding semakan kehakiman yang telah difailkan oleh pemilik-pemilik unit-unit kediaman di Kota Kemuning dan Kemuning Greenville, Shah Alam, Selangor ('pemohon-pemohon'). Pemohon-pemohon telah memohon di Mahkamah Tinggi, antara lain, untuk semakan keputusan Majlis Bandaraya Shah Alam ('MBSA') dalam membenarkan sebidang tanah kosong di Kota Kemuning, Shah Alam untuk digunakan sebagai tanah perkuburan orang Islam. Permohonan MAIS untuk mencelah adalah berdasarkan fakta bahawa MAIS telah memulakan tindakan di Mahkamah Tinggi Syariah, Shah Alam untuk deklarasi bahawa tanah kosong tersebut adalah tanah wakaf dan Mahkamah Tinggi Syariah memiliki bidang kuasa eksklusif untuk memutuskan isu berkenaan wakaf. Permohonan MAIS bagi kebenaran untuk mencelah telah difailkan menurut A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim Mahkamah Tinggi yang bijaksana telah memutuskan bahawa A 15 k 67(2) KMT adalah terpakai untuk prosiding semakan kehakiman. Tetapi, beliau meneruskannya dan berpegang bahawa MAIS telah gagal untuk memenuhi syarat-syarat A 15 k 6(2) KMT dan tiada kepentingan bagi MAIS untuk bersama-sama sebagai pencelah. Permohonan tersebut dengan sewajarnya telah ditolak.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Raus Sharif HMR**, **Hasan Lah HMR** bersetuju) Di bawah KMT, permohonan untuk semakan kehakiman dikawal selia oleh A 53 dan bukannya A 15 k 6(2) KMT. Aturan 53 memperuntukkan pihak-pihak yang hendak didengar atas perkara yang menjadi isu di dalam prosiding semakan kehakiman. Oleh itu, tiada kepentingan bagi MAIS untuk dijadikan satu pihak bagi didengar dan menyokong keputusan MBSA yang dipersoalkan (lihat A 53 k 8(1)) (lihat perenggan 8).

(2) (oleh **Raus Sharif HMR**, **Hasan Lah HMR** bersetuju) Dalam kes ini, pemohon-pemohon telah memohon untuk mempersoalkan keputusan MBSA dalam meluluskan tanah kosong tersebut untuk digunakan sebagai tanah perkuburan. Dalam prosiding tersebut, hanya proses membuat keputusan oleh MBSA yang akan diteliti iaitu sama ada keputusan yang telah dibuat oleh MBSA adalah baik dari segi pentadbiran. Mahkamah Tinggi tidak akan menggantikan dengan keputusannya sendiri. Sesungguhnya, ianya tidak boleh dilakukan, yang mana perintah yang berkemungkinan diperintahkan dalam prosiding

A semakan kehakiman adalah terhad. Oleh itu, tiada kepentingan bagi MAIS untuk bersama-sama sebagai pencelah kepada prosiding semakan kehakiman (lihat perenggan 10).

(3) (oleh **Raus Sharif HMR**, **Hasan Lah HMR** bersetuju) Selanjutnya, B MAIS telah gagal untuk memenuhi syarat-syaratnya yang mana isu wakaf yang ditimbulkan bukanlah satu yang adil dan sesuai untuk ditentukan di dalam prosiding semakan kehakiman. Sesungguhnya, ia secara keseluruhannya tidak berkaitan dengan isu teras yang dipohon oleh pemohon-pemohon di dalam prosiding semakan kehakiman dan C oleh itu akan membentuk satu cubaan memperkenalkan satu kausa tindakan yang keseluruhannya berlainan dan baru di dalam prosiding semakan kehakiman yang mana tidak dibenarkan di bawah A 15 k 6(2)(b) (lihat perenggan 11).

(4) (oleh **Abdul Malik Ishak HMR** menentang) MAIS seharusnya D diberikan kebenaran untuk mencelah di dalam prosiding semakan kehakiman bagi menyokong keputusan MBSA untuk mengenepikan 13.54 ekar tanah bagi tanah perkuburan orang Islam. Pencelahan MAIS juga adalah penting untuk memastikan prosiding Mahkamah Tinggi Syariah di Shah Alam untuk, antara lain, deklarasi bahawa tanah 13.54 E ekar adalah tanah wakaf dan ianya perlu didaftarkan di bawah Enakmen Wakaf (Negeri Selangor) 1999 agar tidak menjadi lewah (lihat perenggan 115).

(5) (oleh **Abdul Malik Ishak HMR** menentang) artikel yang merujuk F kepada wakaf dan definisi perkataan yang dinyatakan di dalam s 2(1) Enakmen 2003 menjadi satu peringatan bahawa wakaf bukanlah satu subjek yang mudah untuk ditangani, perlu diingat bahawa ianya adalah satu isu yang bergantung kepada Mahkamah Tinggi sivil dan Syariah di Shah Alam. Pandangan ulamak atau cendikiawan Islam berkenaan G dengan wakaf dapat membantu Mahkamah Tinggi sivil di Shah Alam untuk membuat keputusan yang adil dalam prosiding semakan kehakiman dan ini hanya boleh dicapai jika MAIS dibenarkan untuk mencelah jika sebaliknya ianya adalah satu penghinaan kepada keadilan. MAIS boleh memainkan peranan yang penting di dalamnya H yang dapat mengurangkan kesan sensitivity kes dalam situasi Mahkamah Tinggi sivil di Shah Alam membuat perintah bahawa jenazah orang Islam yang telah ditanam di 13.54 ekar tanah perlu digali semula (lihat perenggan 126 & 141).]

I **Notes**

For cases on application for intervention, see 2(2)*Mallal's Digest* (4th Ed, 2007 Reissue) paras 3700–3701.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 639–640.

Cases referred to

Abidin bin Umar v Doraisamy & Anor [1994] 1 MLJ 617 (refd)
Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan (Rahaz Sdn Bhd & Anor – Interveners) (and Another Application) [2001] 1 AMR 875 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)
Latifah bt Mat Zin v Rosmawati Sharibun & Anor [2007] 5 MLJ 101 (folld)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156 (refd)
Long v Crossley (1879) 13 Ch D 388 (refd)
Majlis Ugama Islam Pulau Pinang dan Seberang Perai lwn Shaik Zolkaffily bin Shaik Natar dan lain-lain [2002] 4 MLJ 130 (refd)
Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Razman bin Hashim v South East Asia Insurance Co [1995] 2 MLJ 469 (refd)
Sanderson v Blyth Theatre Company [1903] 2 KB 533 (refd)
Shaik Zolkaffily bin Shaik Natar & Ors v Religious Council of Penang [1997] 3 MLJ 281 (refd)
Sundram v Arujunan & Anor [1994] 3 MLJ 361 (refd)
TSB Private Bank International SA v Chabra and another [1992] 2 All ER 245 (refd)
Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143 (refd)
Tetra Molectric Ltd v Japan Imports Ltd (Win Lighter Corp, intervening) [1976] RPC 541 (folld)
Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668 (refd)
Vandervell Trustees Ltd v White & Ors [1971] AC 912 (refd)
Wytcherley v Andrews (1871) LR 2 P & D 327 (refd)

Legislation referred to

Administration of Religion of Islam (State of Selangor) Enactment 2003 ss 2(1), 3, 4, 4(1), 6, 7(1), 89, 90, 91, 92, 93, 94, 95
Courts of Judicature Act 1964 para 1 of the Schedule
Federal Constitution art 121(1A), Item 1 List II ninth Schedule
Local Government Act 1976 s 94
National Land Code ss 62, 433
Rules of the High Courts 1980 O 15 r 6, O 15 r 6(2)(b), O 15 r 6(2)(b)(i), O 15 r 6(2)(b)(ii), O 53, O 53 r 8(1)
Rules of the Supreme Court [UK] O 15, O 15 r 6(2)(b)(ii)
Specific Relief Act 1950
Wakaf (State of Selangor) Enactment 1999 ss 6, 32

A Appeal from: Judicial Review (MT3) No 25–59 of 2006 (High Court, Shah Alam)

Mubashir Mansor (Zainul Rijal Abu Bakar, Abdul Rahim Sinwan & Haniff Khatri with him) (Zainul Rijal Talha & Amir) for the appellant.
B *Malik Imtiaz Sarwar (R Sharmila with him) (Thomas Philip) for the first to 147th respondents.*
Sulaiman Abdullah (Hakimi & Partners) for the 148th respondent.
Amir Mohd Salleh (Hew Kah Chui with him) (Kadir Andri & Partners) for the 149th respondent.
C *Fauziah Mustaffa (Abdul Rahim Saad & Associates) for the 150th and 151st respondents.*

Raus Sharif JCA (delivering majority judgment):

D

[1] This is an appeal against the decision of Shah Alam High Court dismissing the Majlis Agama Islam Selangor's ('MAIS') application for leave to intervene into the judicial review proceedings filed by owners of the residential units in Kota Kemuning and Kemuning Greenville, Shah Alam, Selangor ('the applicants').
E

[2] In the judicial review proceedings the applicants were seeking before the High Court, inter alia, to review the decision of Majlis Bandaraya Shah Alam's decision ('MBSA') in allowing a vacant land about 13.84 acres at No 5, Persiaran Anggerik Eria 31/22, Kota Kemuning, Shah Alam, Selangor ('the F vacant land') to be used as a burial ground.

[3] On 9 July 2008 we heard this appeal whereafter by majority, we dismissed it with costs (Abdul Malik Ishak JCA dissenting).
G

[4] In essence MAIS's application to intervene was based on the fact that MAIS had commenced an action in the Shariah High Court, Shah Alam vide Summons No 10200–07–0235 of 2007 ('Shariah High Court Summons') for a declaration that the vacant land is a *wakaf* land, and the Shariah High H Court of having an exclusive jurisdiction to decide on the issue of *wakaf*. It was argued that under s 7(1) of the Administration of Religion of Islam (State of Selangor) Enactment 2003 MAIS has a duty 'to promote, stimulate facilitate and undertake the economic and social development of the Muslim community in the State of Selangor consistent with *hukum Syarak*. In light of I the aforesaid duties, MAIS has a legal interest in the judicial review proceedings. It was further argued that MAIS needed to be made a party in the judicial review proceedings in order to support the impugned decision of MBSA. This is to ensure that the Shah Alam Shariah High Court Summon will not be rendered otiose.

[5] MAIS's application for leave to intervene was filed in pursuant to O 15 r 6(2)(b) of the Rules of the High Courts 1980 ('RHC'). The rule reads as follows:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (b) order any of the following persons to be added as a party, namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

[6] The learned High Court judge ('the learned judge') held that O 15 r 6(2) of the RHC is applicable to judicial review proceedings. However, she went on to hold that MAIS has failed to satisfy the requirements of O 15 r 6(2) of the RHC and that there is no necessity for MAIS to be joined as an intervener. Accordingly, she dismissed MAIS's application with costs.

[7] We are in agreement with the decision of the learned judge in dismissing MAIS's application. However, we would like to take another step further by holding that O 15 r 6(2) of the RHC is not applicable to judicial review proceedings.

[8] Under the RHC, applications for judicial review are governed by O 53. It is a specific order and there are provisions in the order which cater to parties wanting to be heard on matters in issue in a judicial review proceedings. This is found in O 53 r 8(1) which provides as follows:

> Order 53 r 8
>
> (1) Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears

A to the Judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers in the matter.

Given with the above provisions, there is no necessity for MAIS to be made
B a party in order to be heard and support the impugned decision of MBSA.

[9] Another point is this. The proceedings before the High Court was a judicial review proceedings. It has been said often enough that in judicial review proceedings, the courts are only concerned with the decision making
C process of a public body and not the decision itself. Simply put, the courts are not going to substitute a fairer or just decision of its own. Thus, the view points of other parties after the fact are not relevant at all.

D **[10]** In the present case, the applicants were seeking to impugn the decision of MBSA in approving the said vacant land to be used as a burial ground. In such proceedings, only the decision making process of MBSA would be under scrutiny ie, whether the decisions made by MBSA were administratively sound. The High Courts would not substitute its own decision. In fact, it
E cannot do so, as the orders that may be ordered in a judicial review proceedings are limited. (See para 1 of the Schedule of the Courts of Judicature Act 1964). Thus, we do not see the necessity for MAIS to be joined as an intervener to the judicial review proceedings.

F **[11]** In any event, even if O 15 r 6(2)(b) is applicable to a judicial review proceedings, we are in agreement with the learned judge that MAIS has failed to satisfy its requirements. This is because the issue of *wakaf* as raised by MAIS is not one that is just and convenient to determine within the judicial review proceedings. In fact, it is wholly unrelated to the core issue sought by
G the applicants in the judicial review proceedings. By raising the issue of *wakaf*, MAIS was in effect, attempting to introduce an entirely independent and new cause into a judicial review proceedings. This is not permissible under O 15 r 6(2)(b) of the RHC.

H **[12]** For aforesaid reasons, we upheld the decision of the learned High Court judge. We dismissed the appeal and the usual orders consequential on dismissal were made.

I **Abdul Malik Ishak JCA (delivering dissenting judgment):**

INTRODUCTION

[13] By way of encl 27, MAIS — the proposed intervenor, sought leave to

intervene and be made a respondent in an application for judicial review vide number MT3–25–29 of 2006 between the following parties:

Bong Boon Chuen and 146 Others… Applicants

v

(1) Majlis Bandaraya Shah Alam

(2) Hicom Gamuda Development Sdn Bhd

(3) Tan Sri Dato' Seri (Dr) Haji Abu Hassan Bin Haji Omar (Kp No: 400915-10-5103)

(4) Nur Azman Bin Anuarul Perai (Kp No: 750821-14-5067) (Acting For Them Personally And Representing 632 Residents Of Kota Kemuning And Kemuning Greenville)… Respondents

v

Majlis Agama Islam Selangor… Proposed Intervenor

[14] The proposed intervenor's application and that would be MAIS's application, was heard before the civil High Court at Shah Alam and the learned High Court judge on 14 March 2008 refused leave to intervene. Aggrieved by that decision, MAIS filed a notice of appeal to this court (see the notice of appeal at pp 41–42 of the Appeal Record Jilid 1 ('ARJ1')).

WHO ARE THE PARTIES?

[15] Bong Boon Chuen ('Bong') and the 146 others are non-Muslims and they are the owners of the residential units in Kota Kemuning and Kemuning Greenville townships located at Shah Alam.

[16] Majlis Bandaraya Shah Alam is the local authority constituted under the Local Government Act 1976 (Act 171).

[17] Hicom-Gamuda Development Sdn Bhd is the developer of the Kota Kemuning and Kemuning Greenville townships.

[18] Tan Sri Dato' Seri (Dr) Haji Abu Hassan bin Haji Omar was added as a party pursuant to an intervention application. It is common knowledge that he was the former Menteri Besar of Selangor.

[19] Nur Azman bin Anuarul Perai is an individual representing 632 Muslim residents of the Kota Kemuning and Kemuning Greenville townships and he was added as a party pursuant to an intervention application.

[20] MAIS is a body established under the Administration of the Religion

of Islam (State of Selangor) Enactment 2003 ('Enactment 2003') and it is the proposed intervenor.

THE SUMMONS IN CHAMBERS IN ENCLOSURE 27

[21] MAIS, by this enclosure, sought to intervene as the proposed intervenor by virtue of O 15 r 6(2)(b) of the RHC and sought for the following orders:

(1) that leave be given to MAIS to intervene and be added as a respondent in these proceedings;

(2) that the title to these proceedings be amended to add and name MAIS as a respondent;

(3) that the costs of this application be made costs in the cause; and

(4) that this honourable court makes any consequential order or any order as it deems fit.

[22] Prayer (4) of encl 27 is potentially very wide. It gives the court the inherent power to make the necessary orders in the interest of justice. According to *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, FC and as applied by me in *Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan (Rahaz Sdn Bhd & Anor – Interveners) (and Another Application)* [2001] 1 AMR 875, 927, prayer (4) of encl 27 cannot be considered as a mere ornament. It must be given effect. In the words of Salleh Abas FJ (later the Lord President) who delivered the judgment of *Lim Eng Kay v Jaafar bin Mohamed Said* at p 160 of the report:

> In any case prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning.

[23] Abdul Halem Hapiz bin Salihin ('Halem'), the deputy secretary of MAIS, affirmed an affidavit in support of encl 27 and that can be seen at pp 210–222 of 'ARJ1'. Halem's affidavit in support was affirmed on 21 December 2007. In his affidavit in support, Halem alluded to the following salient facts:

(a) that MAIS was established under s 4 of the Enactment 2003;

(b) that MAIS's role is to aid and advise His Royal Highness the Sultan of Selangor in matters relating to the religion of Islam; and

(c) that MAIS's role is also to administer and to ascertain that the legal

institution of Islam, the administration of Islam and Islamic community in the State of Selangor in particular is protected and proceed smoothly in accordance with hukum Syarak and the Shariah law.

[24] Continuing further Halem then proceeds in his affidavit in reply to set out the background facts that led to the application to intervene by MAIS and, in the course of which, to justify the application of MAIS. Halem averred as follows:

(a) that the developer by the name of Hicom-Gamuda Development Sdn Bhd has set out in its plan a Muslim burial ground comprising of 13.54 acres of land for the use and benefit of the Muslim residents in the area of Kota Kemuning;

(b) that, in furtherance thereto, Majlis Bandaraya Shah Alam had approved a development plan number MBSA/PRG/PSA 31-22-03 for the Muslim burial ground measuring 13.54 acres of land;

(c) that the Jabatan Agama Islam Selangor had made an application to the Pentadbir Tanah Klang for the 13.54 acres of land to be registered and gazetted under s 62 of the National Land Code 1965 ('NLC') as a Muslim burial ground but, till today, the Jabatan Agama Islam Selangor has not received any response from the Pentadbir Tanah Klang pertaining to its application;

(d) notwithstanding the fact that the 13.54 acres of land has not been gazetted as a Muslim burial ground, the said land has been used since 2006 for such purpose — in short, it is an active Muslim burial ground;

(e) that the developer by the name of Hicom-Gamuda Development Sdn Bhd had proceeded to administer and develop the 13.54 acres of land by building a bus depot to the south of the said land and had zoned approximately 33 feet the eastern and the southern parts of the bus depot site in order to separate the development of the Muslim burial ground from the housing area;

(f) that, in consequence thereto, the non-Muslim residents of the Kota Kemuning and Kemuning Greenville townships objected and they preferred that the Muslim burial ground be transferred to another area; and

(g) that, on 17 August 2008, the civil High Court at Shah Alam ordered that pending the outcome of the judicial review proceedings all steps to develop, administer and operate the Muslim burial ground be stopped or stayed.

[25] Halem further averred that on 19 December 2007 MAIS had filed an

action in the Shariah High Court at Shah Alam vide Summons No 10200–007–0235 of 2007 for declarations that the 13.54 acres of land be declared *wakaf* land and be registered in accordance with the Enakmen Wakaf (Negeri Selangor) 1999. A copy of each of the summons and the statement of claim of the action filed in the Shariah High Court at Shah Alam are annexed cumulatively and marked as exh HHS-1. I shall revert to the details of the Shariah High Court action at Shah Alam in due course.

[26] Halem averred that the hearing of the Shariah High Court action at Shah Alam has not been fixed as yet.

[27] Halem has been advised by his counsel and he verily believed that questions pertaining to the interpretations of the registration and listing of the 13.54 acres of land as *wakaf* land would affect the interests of MAIS as the proposed intervenor for the following reasons:

(a) the court would have to ascertain whether it is the civil High Court or the Shariah High Court that has the jurisdiction to determine whether the 13.54 acres of land is *wakaf* land or otherwise;

(b) that by virtue of art 121(1A) of the Federal Constitution the High Courts in Malaya and in Sabah and Sarawak shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts; and

(c) that all these issues and the kind of orders that have to be made would affect the interest of every individual professing the religion of Islam in Selangor because it is related to the jurisdiction of the Shariah Court and that would justify intervention by MAIS in this action.

[28] Halem further deposed in his affidavit in support that MAIS has an interest in the matter as it would be in a position to render valuable advice to the court and that MAIS being a body established under the Enactment 2003 should be allowed to intervene as it would eventually be in a position to advise His Royal Highness the Sultan of Selangor pertaining to the validity and/or the effectiveness of the Shariah law in Selangor.

[29] Halem averred that based on the purpose for the establishment of MAIS under the Enactment 2003, MAIS as the proposed intervenor would be a relevant entity that has an interest to intervene. And Halem advanced the following reasons:

(a) that MAIS is a statutory body;

(b) that MAIS is a body interested to ensure that the administration and

enforcement of hukum Syarak and Islamic law for the benefit of Islamic institutions and the Muslim community in Selangor generally are being carried out;

(c) that the objectives of MAIS would be to care and ensure that the right and interest of the Muslim community in Selangor in particular and the nation in general are being safeguarded in the context of preserving the Islamic law and the hukum Syarak; and

(d) that all things related to the law affecting the issues and questions pertaining to Islam that would give an effect and/or would create an impact specifically on hukum Syarak and the Muslim community in general must of necessity be an interest that cannot be denied and, in this action, MAIS as the proposed intervenor would have an interest thereto.

[30] The stand of MAIS, as alluded to by Halem in his affidavit, may be summarised in this way. That the actions of Bong and the 146 others and the issues which they raised directly affected and touched the interests of MAIS and that would entitle MAIS to attend the present proceedings in the civil High Court at Shah Alam as the proposed intervenor in order to preserve MAIS's interests.

[31] Halem continued to aver as follows. That if MAIS's proposed application to intervene as an intervenor is refused and/or is denied, the interests of all Muslim citizens in Selangor would be prejudiced and that would affect the integrity of MAIS.

[32] Halem further deposed that according to O 15 r 6(2)(b)(i) of the RHC any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, has to be added as a party. Halem likened MAIS as that party who ought to have been joined as a party. Relying also on O 15 r 6(2)(b)(ii) of the RHC, Halem averred that it would be just and convenient to add MAIS as a party.

[33] Halem categorically stated that the interest of MAIS as the proposed intervenor overshadowed its commercial interest. According to him, the responsibility of MAIS to all the citizens in Selangor reign supreme. And if MAIS's application to intervene is refused and/or denied then it would prejudice and/or give a negative impact on those individual or entity that needed to be defended by MAIS and, consequently, it would go against the principles that justice must not only be done but must be seen to be done.

[34] Halem deposed further that for all the reasons that have been raised and, on the advice of his counsel, he believed that MAIS's application to intervene ought to be granted by the court.

[35] Finally, Halem craved the court's indulgence to allow the prayers as set out in encl 27 based on the reasons advanced by him and in the interest of justice.

[36] By way of a rebuttal to the affidavit in support of Halem, Bong affirmed an affidavit styled as 'affidavit (No 1)' on 4 February 2008 as seen at pp 231 to 237 of 'ARJ1'. In that affidavit, Bong deposed to the following averments and he did so on his own behalf and on behalf of the other 146 others.

[37] Bong averred that he and the 146 others opposed MAIS's application to intervene. He said that his solicitors advised him and he verily believed that MAIS's application is misconceived and/or does not have any basis in law and/or fact.

[38] Bong further averred that he was advised by his solicitors to say that:

(a) the objects of MAIS are set out in the Enactment 2003, particularly ss 6 and s 7(1) thereto;

(b) that the establishment of burial grounds for Muslims is not a matter falling within the ambit and scope of ss 6 and 7(1) of the Enactment 2003 but it is a matter falling within the jurisdiction of the local authority as envisaged in s 94 of the Local Government Act 1975 (Act 171);

(c) that the question of the validity of the decision of Majlis Bandaraya Shah Alam in the judicial review proceedings is not a matter in which MAIS has any legal interest in;

(d) that MAIS is in a position to advise his Royal Highness the Sultan of Selangor to what extent the issues at hand relate to Islam without being made a party to these proceedings; and

(e) the fact that MAIS has lodged an application under s 62 of the NLC is of no relevance at all.

[39] Bong averred that the conduct of Majlis Bandaraya Shah Alam and the conduct of Hicom-Gamuda Development Sdn Bhd that were referred to in MAIS's application to intervene are matters that were already in issue in the underlying review proceedings. Bong and the 146 others dispute the assertion by MAIS that the alleged burial ground had been in use since 2006.

According to Bong, the very basis of the declaration of the 13.54 acres of land as a burial ground is under challenge herein. A

[40] Bong deposed that he was advised by his solicitors to say that the question of whether the 13.54 acres of land was and is *wakaf* land is not relevant to the underlying judicial proceedings. It is said that Hicom-Gamuda Development Sdn Bhd denied that it had established the alleged burial ground on the basis that the 13.54 acres of land was *wakaf* land or that the said land was intended as a charitable purpose to be utilised as a Muslim burial ground. According to Bong, the Shariah High Court proceedings at Shah Alam are irrelevant. B C

[41] Bong further ventured to say that:

(a) the Shariah High Court proceedings at Shah Alam are wholly misconceived; D

(b) that Majlis Bandaraya Shah Alam and Hicom-Gamuda Development Sdn Bhd are not 'persons professing the religion of Islam' within the meaning of Item 1, List II of the ninth Schedule to the Federal Constitution; E

(c) that Article 121(1A) of the Federal Constitution has no bearing to the issues at hand; and

(d) that the position adopted on the issue of *wakaf* land is contradictory to MAIS's position that it wishes the 13.54 acres of land to be used as a burial ground for Muslims. F

[42] Bong also deposed to the following set of facts:

(a) that MAIS has not advanced any material before the court to show such an interest that would warrant it being joined as a party to these proceedings and that, at best, MAIS has a passing interest; G

(b) that O 15 r 6(2)(b) of the RHC has no application in the context of MAIS's intervention application; H

(c) that there is no basis to support the suggestion by MAIS that if MAIS's application is denied the interests of each individual professing the religion of Islam in Selangor would be prejudiced; and

(d) that the role and function of MAIS are as set out in the Enactment 2003. I

[43] Finally, Bong also craved the court's indulgence to dismiss MAIS's application to intervene with costs. Bong wanted the court to give a direction

A that costs be paid forthwith and that it be taxed on a full indemnity basis for the following reasons:

(a) that there was no basis in law or in fact for MAIS to file the intervention application; and

B (b) that MAIS's application has caused undue delay for the disposal of the judicial review proceedings before the civil High Court at Shah Alam and MAIS has not advanced any reason for the delay.

C **[44]** Tham Yim Yok ('Tham'), the general manager of Hicom-Gamuda Development Sdn Bhd, affirmed an affidavit on 4 February 2008 in response to Halem's affidavit in support. Tham's affidavit is styled as 'the second respondent's affidavit' and he averred that it is not the intention of Hicom-Gamuda Development Sdn Bhd to either support or oppose MAIS's application to intervene in encl 27. Tham's affidavit can be seen at pp D 246–251 of 'ARJ1'.

[45] According to Tham, the Muslim burial site was not provided for and/or proposed by Hicom-Gamuda Development Sdn Bhd in the initial development plan submitted to Majlis Bandaraya Shah Alam, which was E approved on 15 December 1995 and again on 27 August 1996 by Jabatan Perancang Bandar dan Desa Negeri Selangor. And, thereafter, on 29 December 1995 Majlis Bandaraya Shah Alam approved the development plan which did not contain the burial site.

F **[46]** According to Tham, the location of the burial site was imposed by Majlis Bandaraya Shah Alam on 26 December 1996 and from then onwards the burial site appeared on the plans for the relevant development.

G **[47]** According to Tham, Hicom-Gamuda Development Sdn Bhd made appeals for the relocation of the Muslim burial site and negotiated with Majlis Bandaraya Shah Alam to relocate the said burial site. Tham averred that Hicom-Gamuda Development Sdn Bhd suggested to Majlis Bandaraya Shah Alam various alternative sites and even offered to purchase some alternative H land in order to effect the relocation of the Muslim burial site.

[48] According to Tham, amongst the alternative sites proposed to Majlis Bandaraya Shah Alam were:

I (a) the relocation of the Muslim burial site to Bukit Raja;

(b) the proposal for compensation of RM2.7m by Hicom-Gamuda Development Sdn Bhd to Majlis Bandaraya Shah Alam in lieu of the imposition of Muslim burial site at the Kota Kemuning and Kemuning Greenville townships;

(c) the relocation of the Muslim burial site to Jalan Kapar;

(d) the relocation of the Muslim burial site to section 15, Shah Alam;

(e) the relocation of the Muslim burial site to section U14, Shah Alam;

(f) the relocation of the Muslim burial site to Jalan Kebun;

(g) the relocation of the Muslim burial site to Jalan Bukit Kemuning; and

(h) the proposal to either contribute RM2.7m to Majlis Bandaraya Shah Alam in order for the said Majlis to purchase an alternative land or for Hicom-Gamuda Development Sdn Bhd to purchase another piece of land identified by Majlis Bandaraya Shah Alam to be a suitable alternative site for the Muslim burial ground.

[49] The secretary of MAIS by the name of Dato' Hj Mohammed Khusrin bin Hj Munawi ('Dato Mohammed') affirmed an affidavit in reply dated 22 February 2008 as can be seen at pp 259–266 of 'ARJ1' and his affidavit replied to Bong's affidavit.

[50] Dato' Mohammed, in his affidavit in reply, denied that MAIS's application to intervene is misconceived and he too denied that MAIS's application does not have any basis in law or fact. Dato' Mohammed repeated and adopted the averments of Halem as alluded to earlier.

[51] According to Dato' Mohammed, the setting up of the Muslim burial ground which has become an issue in these proceedings is caught within the ambit of the 'social development of the Muslim community in the State of Selangor consistent with hukum Syarak' as set out in s 7(1) of the Enactment 2003.

[52] MAIS, as a body responsible to advise His Royal Highness the Sultan of Selangor in respect of all matters relating to the religion of Islam in the State of Selangor, should be directly involved in these proceedings so that it would be in a better position to understand the whole case and, consequently, be able to acquire a better perspective of those proceedings and, ultimately, be in a better position to advise His Royal Highness the Sultan of Selangor effectively — so averred Dato' Mohammed.

[53] Dato' Mohammed categorically stated that the suggestions by Bong in Bong's affidavit that MAIS has no interest in these proceedings and that MAIS is still in a position to advise His Royal Highness the Sultan of Selangor without being made a party to these proceedings are arguments that are designed to stifle the role of MAIS and to curtail MAIS's statutory duties under the Enactment 2003.

[54] According to Dato' Mohammed, the averment by Bong that MAIS's lodgment of an application under s 62 of the NLC is of no relevance is totally unacceptable. It is, according to Dato' Mohammed, an allegation without any basis. What is of relevance is the fact that MAIS has played its role effectively when it applied to gazette the 13.54 acres of land as a Muslim burial ground and it is the responsibility of MAIS to apply to the court and be made a party to these proceedings.

[55] It is undeniable, according to Dato' Mohammed, that it is the duty of Majlis Bandaraya Shah Alam as the local authority under s 94 of the Local Government Act 1976 (Act 171) to provide burial grounds and crematoria and issue licences for the same. But that should not impede MAIS's noble cause to declare the 13.54 acres of land as a *wakaf* land bearing in mind that it is consistent with the Jabatan Agama Islam Selangor's application to register and gazette the 13.54 acres of land under s 62 of the NLC as a Muslim burial ground.

[56] Dato' Mohammed again referred to Bong's affidavit which said that whether the 13.54 acres of land was and is *wakaf* land is not relevant to the underlying judicial proceedings and to this, Dato' Mohammed averred that the issue of *wakaf* land is relevant because it is directly related to the present proceedings.

[57] According to Dato' Mohammed, the issue of *wakaf* land is relevant bearing in mind that MAIS's application in the Shariah High Court at Shah Alam for a declaration that the 13.54 acres of land is a *wakaf* land, if successful, would render the judicial review proceedings as otiose and the civil High Court at Shah Alam would, consequently, refuse to grant those prayers sought by Bong and the 146 others in the judicial review proceedings.

[58] Of crucial importance is the averment by Dato' Mohammed to the effect that he has been advised by his solicitors to say and he verily believe that Shariah laws have their own jurisprudence in any given case which must necessarily include the revered views of the *ulama* ('body of Muslim scholars, recognised as having specialised knowledge of Islamic sacred law and theology') (see p 249 of *Kamus Dwibahasa Oxford Fajar* by Joyce M Hawkins, (3rd Ed)). All these, according to Dato' Mohammed, would be heard before the Shariah High Court at Shah Alam.

[59] Dato' Mohammed took exception to the averment by Bong that the Shariah High Court proceedings at Shah Alam are wholly misconceived and that MAIS and Hicom-Gamuda Development Sdn Bhd are not 'persons professing the religion of Islam' within the meaning of Item 1, List II of the ninth Schedule to the Federal Constitution. According to Dato' Mohammed

such an averment should be made before the Shariah High Court at Shah Alam and not before the civil High Court at Shah Alam. A

[60] According to Dato' Mohammed there is nothing wrong in making MAIS as a party to these proceedings bearing in mind that art 121(1A) of the Federal Constitution applies in these proceedings. B

[61] It is MAIS's stand that there is no conflict between the desire of MAIS to use the 13.54 acres of land as a Muslim burial ground with the issue of the *wakaf* land. Both these two issues run parallel with one another and they support one another. C

[62] MAIS's actions in filing a proceeding in the Shariah High Court at Shah Alam in order to seek a declaration that the 13.54 acres of land is a *wakaf* land and that it should be registered in accordance with the Enakmen Wakaf (Negeri Selangor) 1999 are purely based and after taking into account the importance of the religion of Islam and those Muslims who are affected by the judicial review proceedings. D

E

[63] Dato' Mohammed averred further to the following effect. That under s 89, Bahagian VI (Kewangan) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003, MAIS is the sole trustee of all kinds of *wakaf*, be it '*wakaf am*' or '*wakaf khas*'; and MAIS is also the sole trustee for all '*nazr am*' and all forms of trust to support and advance the religion of Islam and for the benefit of all Muslims in accordance with hukum Syarak in the State of Selangor. F

[64] For these reasons and on the advice of his solicitors, Dato' Mohammed categorically stated that the proceedings in the Shariah High Court at Shah Alam are relevant and its effect should be taken into account by the civil High Court at Shah Alam. G

[65] According to Dato' Mohammed if the proceedings in the Shariah High Court at Shah Alam for a declaration that the 13.54 acres of land is *wakaf* land is successful then the judicial review proceedings would be rendered academic because art 121(1A) of the Federal Constitution would bar the civil High Court at Shah Alam from disposing of the matter. H

[66] In his affidavit, Bong said that MAIS's interests are vague. In rebuttal, Dato' Mohammed emphasised that MAIS had clearly set out the reasons to warrant the court in granting MAIS's application to intervene. MAIS is also of the view that O 15 r 6(2)(b) of the RHC is appropriate and would apply to the situation at hand. I

[67] According to Dato' Mohammed, the basis of MAIS's application to intervene, inter alia, would be that if the application to intervene is refused it would prejudice the interests of Islam and the Muslim community in the State of Selangor. For that reason, MAIS's application should be allowed as it is justifiable.

[68] In regard to the issue of delay, MAIS explained that it would not prejudice Bong and the 146 others because of the existence of the order of the civil High Court at Shah Alam dated 17 August 2008 which halted any burial activity on the Muslim burial site.

THE SHARIAH HIGH COURT ACTION AT SHAH ALAM

[69] As promised, I shall now revert to the details of the Shariah High Court action at Shah Alam. In the appeal record tambahan ('ART') at pp 9 to 30 thereto, the parties before the Shariah High Court at Shah Alam vide Summons No 10200–007–0235 of 2007 are as follows:

> Majlis Agama Islam Selangor… Plaintiff
>
> v
>
> (1) Hicom-Gamuda Development Sdn Bhd
>
> (2) Majlis Bandaraya Shah Alam… Defendants

[70] The statement of claim before the Shariah High Court at Shah Alam named Hicom-Gamuda Development Sdn Bhd and Majlis Bandaraya Shah Alam as the defendants. After introducing the parties, MAIS proceeded to narrate the facts. Forgive me for narrating the facts, once again, as seen from the spectacles of MAIS before the Shariah High Court at Shah Alam.

[71] That Hicom-Gamuda Development Sdn Bhd allocated in their plan a Muslim burial ground measuring 13.54 acres sited at No 5, Persiaran Anggerik Eria 31/122, Kota Kemuning, Seksyen 31 Shah Alam. That on 28 December 2002, Majlis Bandaraya Shah Alam approved a development plan number MBSA/PRG/PSA for the Muslim burial ground on the 13.54 acres of land. On 27 June 2005, Jabatan Agama Islam Selangor by letter applied to the Pentadbir Tanah Klang to gazette the 13.54 acres of land under s 62 of the NLC as a Muslim burial ground and that letter can be seen at p 16 of 'ART' and it is worded as follows:

> Tarikh: 27 Jun 2005
>
> Permohonan Untuk Mewartakan Tanah Kerajaan Di Kota Kemuning, Daerah Klang Sebagai Tapak Tanah Perkuburan.
>
> Dengan segala hormatnya saya diarah merujuk kepada perkara di atas.

2. Adalah dimaklumkan bahawa sebidang tanah di Kota Kemuning, Daerah Klang telah diperuntukkan bagi tapak tanah perkuburan. Tanah yang dimaksudkan adalah seperti yang bertanda di pelan.

3. Sehubungan dengan itu, Jabatan ini memohon agar tanah tersebut diwartakan sebagai tapak tanah perkuburan di bawah s 62 Kanun Tanah Negara dan dikawal oleh Pengarah Jabatan Agama Islam Selangor. Sukacita dapat pihak tuan mengemukakan sesalinan pewartaannya untuk rekod Jabatan ini.

Sekian, terima kasih.

'BERKHIDMAT KERANA ALLAH UNTUK NEGARA'

Saya yang menurut perintah,

Sgd. Illegible

(SAMSIYAH BT HJ TUMIRAN)

Penolong Pengarah (Pengurusan),

bp Pengarah

Jabatan Agama Islam Selangor.

sk

Pengarah

Jabatan Agama Islam Selangor.

Timbalan Pengarah (Pengurusan),

Jabatan Agama Islam Selangor.

[72] The third paragraph of the said letter was a request to gazette the land — referring to 13.54 acres of land as per the plan attached, under s 62 of the NLC as a Muslim burial ground and it also requested that the gazette notification be sent to Jabatan Agama Islam Selangor. Unfortunately, till today, the Jabatan Agama Islam Selangor has yet to receive any response to its application.

[73] Notwithstanding the absence of the gazette notification, the statement of claim averred that the 13.54 acres of land had been used since 2006 where deceased Muslims have been buried there.

[74] It is also averred that Hicom-Gamuda Development Sdn Bhd — the developer, has carried out works on the 13.54 acres of land. It is stated in the statement of claim that the non-Muslim residents of the Kota Kemuning area objected to the presence of the Muslim burial ground there and that they had filed an application at the civil High Court at Shah Alam to relocate the Muslim burial ground elsewhere. Towards this end, the non-Muslim residents

had filed a judicial review proceeding vide MT3–25–29 of 2006 to review the decision of Majlis Bandaraya Shah Alam. Pending the disposal of the judicial review proceedings, the civil High Court at Shah Alam ordered on 17 August 2008 that the development and management of the 13.54 acres of land be stayed. And that order has been exhibited and marked as exh HHS-2 and it can be seen at pp 20–28 of 'ART'.

[75] As a result of the order dated 17 August 2008, deceased Muslims could no longer be buried on the 13.54 acres of land designated by Majlis Bandaraya Shah Alam as a Muslim burial ground. This has been construed by the Muslims in Kota Kemuning as well as the surrounding areas as nothing else but hardship.

[76] What Hicom-Gamuda Development Sdn Bhd did by allocating the 13.54 acres of land for burial purposes was for the benefit of the Muslim residents in Kota Kemuning, in particular, as well as the other Muslims in the vicinity, in general.

[77] Hicom-Gamuda Development Sdn Bhd's allocation of 13.54 acres of land has created a *wakaf* of the said land for the benefit of the Muslims at Kota Kemuning, in particular, as well as the other Muslim residents in the vicinity, in general.

[78] Till to date, there is no declaration by any Shariah Court in Malaysia that the 13.54 acres of land is a *wakaf* land.

[79] According to MAIS, all the elements and conditions of *wakaf* have been fulfilled in accordance with the Enakmen Wakaf (Negeri Selangor) 1999 and that MAIS would prove it during the trial before the Shariah High Court at Shah Alam.

[80] It is averred that MAIS under s 32 of the Enakmen Wakaf (Negeri Selangor) 1999 are trustees of all *wakaf am* or *wakaf khas* in the State of Selangor.

[81] It is averred that it is MAIS's duty to promote, stimulate, facilitate and undertake the economic and social development of the Muslim community in the State of Selangor consistent with hukum Syarak within meaning of s 7(1) of the Enactment 2003.

[82] For all these reasons, MAIS with humility craves the court's indulgence to grant MAIS the following orders:

(a) for an order that 13.54 acres of land allocated by Hicom-Gamuda Development Sdn Bhd be registered and declared as a *wakaf* land;

(b) for an order that once the 13.54 acres of land has been declared as a *wakaf* property, that property be registered in accordance with s 6 of the Enakmen Wakaf (Negeri Selangor) 1999; and

(c) for any other order or relief as this Honourable Court deems fit to grant.

[83] It must be stated, once again, that the trial before the Shariah High Court at Shah Alam has not started yet.

INTERLOCUTORY APPLICATION OF HICOM-GAMUDA DEVELOPMENT SDN BHD STYLED AS PRELIMINARY OBJECTION BEFORE THE SHARIAH HIGH COURT AT SHAH ALAM

[84] This interlocutory application can be seen at pp 31–33 of 'ART', and there Hicom-Gamuda Development Sdn Bhd sought to strike out MAIS's summons vide No 10200–007–0235 of 2007 before the Shariah High Court at Shah Alam on the following grounds:

(a) that the Shariah High Court at Shah Alam has no jurisdiction to hear and decide the case bearing in mind that it is an abuse of the process of the court because there is a judicial review proceeding before the civil High Court at Shah Alam vide No MT3–25–29 of 2006 where Hicom-Gamuda Development Sdn Bhd is a party involved pertaining to the 13.54 acres of land where the rights of non-Muslims are affected;

(b) that the 13.54 acres of land has not been gazetted as a burial ground under the NLC;

(c) that MAIS has no cause of action against Hicom-Gamuda Development Sdn Bhd because the latter did not intend to create a *wakaf* under the Enakmen Wakaf (Negeri Selangor) 1999;

(d) that costs to be borne by MAIS; and

(e) for any other order or relief as this Honourable Court deems fit to grant.

[85] Wong Ying Kui ('Wong') affirmed an affidavit in support of Hicom-Gamuda Development Sdn Bhd's application to strike out MAIS's

application before the Shariah High Court at Shah Alam and that can be seen at pp 34–39 of 'ART'. Wong affirmed that affidavit on 31 March 2008 and there he deposed to, inter alia, the following averments:

(a) that Hicom-Gamuda Development Sdn Bhd had no intention to create a *wakaf* in regard to the 13.54 acres of land;

(b) that notwithstanding that *wakaf* is listed in the Federal Constitution and comes under the jurisdiction of the Shariah High Court at Shah Alam, yet MAIS is not registered as a trustee to the 13.54 acres of land and the rights of non-Muslims are also involved and, consequently, the Shariah High Court at Shah Alam has no jurisdiction to hear the case;

(c) that by virtue of the Federal Constitution, the Shariah High Court at Shah Alam has jurisdiction to adjudicate matters affecting the Muslims only and since the issue of *wakaf* is not an issue before the judicial review proceedings at the civil High Court at Shah Alam it follows, therefore, that the Shariah High Court at Shah Alam has no jurisdiction to issue any order affecting the rights of the non-Muslims in regard to the 13.54 acres of land;

(d) that MAIS has no jurisdiction to intervene because the 13.54 acres of land is not a *wakaf* land as yet;

(e) that s 62 of the NLC must be read with s 433 of the NLC;

(f) that since there is no issue of *wakaf* to be adjudicated upon, the Shariah High Court at Shah Alam has no jurisdiction to grant the orders sought by MAIS;

(g) that Majlis Bandaraya Shah Alam by letter dated 26 December 1996 directed Hicom-Gamuda Development Sdn Bhd to set aside the 13.54 acres of land as a Muslim burial ground;

(h) that Hicom-Gamuda Development Sdn Bhd disagreed with the setting aside of 13.54 acres of land as a Muslim burial ground and had proposed alternative sites; and

(i) that Hicom-Gamuda Development Sdn Bhd had no intention to establish a *wakaf* for the 13.54 acres of land.

[86] For all these reasons, Wong prayed that his application to strike out MAIS's application before the Shariah High Court at Shah Alam be allowed.

ANALYSIS

[87] I have taken an arduous route to narrate the facts of the case. It is a necessary evil. Everything revolves on the 13.54 acres of land.

[88] MAIS merely wants to intervene as a party in the judicial review proceedings before the civil High Court at Shah Alam.

[89] It is a basic principle of law, and I have subscribed to it all these years, that as far as possible all the appropriate parties should be before the court so that justice may be seen to be done and may be done to all concerned. It must be borne in mind that any person who is not brought into the suit as a party cannot be adjudged liable to the claimant. Any determination of liability against any person who is not made a party would infringe the rules of natural justice (*Sundram v Arujunan & Anor* [1994] 3 MLJ 361; and *Razman bin Hashim v South East Asia Insurance Co* [1995] 2 MLJ 469).

[90] The reverse is also true. Thus, if any person who decides not to be joined as a party, that person is not entitled to appeal against the court's decision even though his rights or interests are affected. This court in *Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor* [1995] 1 MLJ 668 ruled that the old Chancery practice of allowing a non-party to appeal against a decision with leave in special circumstances does not apply in Malaysia.

[91] It pays to take note of what the court in *Wytcherley v Andrews* (1871) LR 2 P & D 327, at p 328 said:

> If a person is content to stand by and see his battle fought by somebody else … he should be bound by the result, and not be allowed to re-open the case.

[92] It is for that reason that MAIS wants to intervene and be made a party in the judicial review proceedings before the civil High Court at Shah Alam. MAIS is not content to see its battle fought without being allowed to intervene. It is germane to mention that MAIS has a statutory duty to discharge. It is set out in the Enactment 2003. Section 4(1) of the Enactment 2003 enacts as follows:

> Establishment of the Majlis
>
> 4(1) There shall be a body known as the 'Majlis Agama Islam Selangor' to aid and advise His Royal Highness the Sultan in matters relating to the religion of Islam.

[93] Section 6 of the Enactment 2003 enacts as follows:

> The Majlis shall aid and advise His Royal Highness the Sultan
>
> The Majlis shall aid and advise His Royal Highness the Sultan in respect of all matters relating to the religion of Islam in the State of Selangor, except matters of Hukum Syarak and those relating to the administration of justice, and in all such matters shall be the chief authority in the State of Selangor after His Royal Highness the Sultan, except where otherwise provided in this Enactment.

[94] Indeed, MAIS has an onerous duty to perform and it is not an easy one to discharge.

[95] It defies logic and commonsense and it borders on absurdity to say that without being allowed to intervene, MAIS is still in a position to advise His Royal Highness the Sultan of Selangor about the outcome of the judicial review proceedings. Such a submission challenges the intellectual capacity of this court. I reject such a submission forthwith.

[96] Under O 15 of the RHC, a person who is not a party but claims that he should be made a party may apply to be joined. It must be borne in mind that the court may on its own motion make an order for a person to be joined as a party or to cease being a party.

[97] I will now reproduce O 15 r 6(2)(b)(i) and (ii) of the RHC:

> 6 Misjoinder and non-joinder of parties (O 15 r 6)
>
> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (b) order any of the following persons to be added as a party, namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

[98] Paragraph (b)(i) of O 15 r 6(2) of the RHC revolves on the principle that joinder must be necessary for the determination of the issues in the case. The Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 stated that the appropriate question to be put forward when

considering whether a person ought to be joined as a party to the action can be distinctly seen in the speech of Lord Diplock at p 56 of the report. There his Lordship asked this question:

> will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

[99] The subject matter of the judicial review proceedings concerns the status of the 13.54 acres of land which MAIS says that Hicom-Gamuda Development Sdn Bhd has set it aside as a Muslim burial ground and which Majlis Bandaraya Shah Alam had, on 26 December 1996, directed Hicom-Gamuda Development Sdn Bhd to set aside 13.54 acres of land as a Muslim burial ground. To allow MAIS to intervene in the judicial review proceedings must necessarily mean that the civil High Court at Shah Alam may effectually and completely determine the issue of the 13.54 acres of land and adjudicate upon it effectively and expeditiously.

[100] In *Long v Crossley* (1879) 13 Ch D 388, Fry J, held that as the plaintiff there who was a tenant for life who sued for specific performance of an agreement for a lease had no power of leasing, it was appropriate for those persons entitled in remainder to be added as plaintiffs also.

[101] The English Court of Appeal in *Sanderson v Blyth Theatre Company* [1903] 2 KB 533 allowed an architect to be added as a defendant in an action for work done and materials supplied simply because the defendant company had denied that it or the architect (the agent of the defendant company) had requested for the services and the materials accordingly.

[102] If a question is asked as to whether MAIS ought to have been joined as a party or whose presence before the civil High Court at Shah Alam is necessary to ensure that all matters in dispute in the cause or matter relating to the 13.54 acres of land, may be effectually and completely determined and adjudicated upon, I would answer it in the positive. The following pertinent facts should not be overlooked:

(a) that since 2006, the 13.54 acres of land has been used as a Muslim burial ground — it is an active burial ground;

(b) at the bar, Mr Malik Imtiaz Sarwar for Bong and the 146 others told this court that a small number of the deceased Muslims have been buried on the 13.54 acres of land;

(c) that the burial stopped when the civil High Court at Shah Alam on 17 August 2008 injuncted any burial activity to be carried out there;

(d) that there is a pending Shariah High Court's case at Shah Alam to declare the 13.54 acres of land as a *wakaf* land; and

(e) the issue of *wakaf* land is a live issue both at the civil High Court at Shah Alam and at the Shariah High Court at Shah Alam.

[103] The court has a broader and wider discretion to allow intervention under O 15 r 6(2)(b)(ii) of the RHC. It is comforting to know that there is such a provision in the RHC. It makes sense to have such an enabling provision because sometimes a joinder of a person may not be strictly necessary but it may be convenient and must therefore be just to allow such a joinder.

[104] The need for more flexibility is shown in the case of *Vandervell Trustees Ltd v White & Ors* [1971] AC 912, HL. That case concerned a dispute between trustees and executors in respect of the ownership of certain trust assets. The inland revenue was concerned in the matter because it had made a tax assessment concerning the trust assets which was related to the issue of their ownership. Allowing the joinder of the inland revenue, Lord Reid had this to say at pp 929–930:

> I find this is so strange as to be inexplicable if it is not competent to make a rule of court bringing in the revenue and so preventing the same issue from being raised again before the special commissioners.

[105] Buckley J, in *Tetra Molectric Ltd v Japan Imports Ltd (Win Lighter Corporation, intervening)* [1976] RPC 541 had this to say in regard to para (b)(ii) of r 6(2) of O 15 of the RSC:

> it widens the discretion of the court to a great extent, for now the court may add any person… if the question or issue involved is one which in the opinion of the court it would be just and convenient to determine as between the applicant and the present party … as well as between the parties to the proceedings themselves.

[106] So long as it is 'just and convenient', and it is so in this appeal, it would be appropriate to add MAIS as a party to the judicial review proceedings

[107] Mummery J, in *TSB Private Bank International SA v Chabra and another* [1992] 2 All ER 245, at the Chancery Division, added a party pursuant to RSC O 15 r 6(2)(b)(ii). This was what Mummery J, said at p 252 of the report:

> In this state of uncertainty about the ownership of 5 Beverley Drive I am of the view that I should not strike out the company as a party to these proceedings. As I have said, I made the order for its joinder of my own motion pursuant to RSC

O 15 r 6. I considered that the presence of the company before the court was necessary to ensure that all matters in dispute in the cause or matter might be effectually and completely determined and adjudicated upon by adding the company as a party. I also considered that the position of the company fell within the broad provisions of O 15 r 6(2)(b)(ii) namely that there (sic)(they)could be joined as a party:

> any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

I also considered when I made the order for the joinder of the company that it should be joined as a party if, as I intended, an injunction was to be made against it, so that it would then have the benefit of the cross-undertaking in damages which the plaintiff was required to give.

[108] While sitting on the High Court bench, I did say in *Abidin bin Umar v Doraisamy & Anor* [1994] 1 MLJ 617 that the discretion of the court to order joinder under r 6 of O 15 of the RHC must depend on the circumstances of the case. In that case, I ordered the driver of the motor lorry to be joined as a party because the said driver could give material evidence as to how the accident occurred. In allowing the joinder, I applied the following passage of the judgement of Edgar Joseph Jr SCJ in *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143, at p 153:

> … the objects of paragraph (2)(b) as to joinder of parties are generally speaking the same as the objects of the rules governing third party proceedings, that is to say:
>
> (1) to prevent multiplicity of proceedings and to enable the court to determine disputes between all parties to them in one action, and
>
> (2) to prevent the same or substantially the same questions or issues being tried all over again with possibly different results.

[109] It is part and parcel of my judgment that MAIS should be allowed to intervene. On the facts, it is 'just and convenient' that MAIS be allowed to intervene.

[110] In all the affidavits which have been referred to in this judgment, the parties made references to the religion of Islam in the context of the Muslim burial ground. In the judicial review proceedings, Bong and the 146 others are seeking a review of the decision of the Majlis Bandaraya Shah Alam that directed that 13.54 acres of land in the Kota Kemuning and Kemuning Greenville townships be set aside as a Muslim burial ground. According to

Tham, Hicom-Gamuda Development Sdn Bhd offered alternative burial sites to the Majlis Bandaraya Shah Alam and to re-locate elsewhere the Muslim burial ground currently at Kota Kemuning and Kemuning Greenville townships. Relocation would entail exhuming the bodies of the deceased Muslims that are already buried there. It is a sensitive issue. Relatives of the deceased Muslims may not be happy when they are told that the bodies of their relatives are to be exhumed and relocated elsewhere. The situation is rather fragile. It is made more fragile if MAIS is not allowed to intervene. Who will be held responsible if anything unfavourable and untoward were to happen? In my judgment, it is certainly 'just and convenient' that MAIS should be allowed to intervene. There are no two ways about it.

[111] Religion is also a sensitive issue. I take judicial notice that religion is a sensitive and a combustible subject. No amount of polemics can reduce the sensitivity of the matter especially in these difficult and challenging times. Prevention is better than cure. To be safe is better than to be sorry. The very thought of it makes one shiver with fright. We must not throw caution to the wind. We must act prudently for the good of the country.

[112] Tuan Haji Sulaiman Abdullah for Majlis Bandaraya Shah Alam agreed with the submissions of Mr Mubashir Mansor for MAIS. Tuan Haji Sulaiman Abdullah rightly submitted that the civil High Court judge would be assisted by MAIS who is acting for the interest of the Muslim community if MAIS is allowed to intervene. It is true that MAIS is the spokesperson of the Muslim community in that area. According to Tuan Haji Sulaiman Abdullah, MAIS is in a position to assist the civil High Court judge at Shah Alam about the relevant provisions of the law that are applicable. It is emphasised that MAIS has a legal interest in the matter and should be allowed to intervene.

[113] According to Mr Mubashir Mansor, s 7(1) of the Enactment 2003 is worded widely and it caters for a variety of situations. If, according to Mr Mubashir Mansor, a decision in regard to a Muslim burial site does not come under s 7(1) of the Enactment 2003, what is? Indeed, that is an apt question. Section 7(1) of the Enactment 2003 enacts as follows:

> 7 The duty of the Majlis for the economic and social development of Muslims
>
> (1) It shall be the duty of the Majlis to promote, stimulate, facilitate and undertake the economic and social development of the Muslim community in the State of Selangor consistent with Hukum Syarak.

[114] It is further submitted by Mr Mubashir Mansor, and rightly so, that once a decision has been made by the Majlis Bandaraya Shah Alam in regard to the Muslim burial ground, automatically MAIS will acquire a legal

interest. With respect, the civil High Court judge at Shah Alam was right when she held that Tan Sri Dato' Seri (Dr) Haji Abu Mansor bin Haji Omar and Nur Azman bin Anuarul Perai who acted for himself personally and representing 632 residents of Kota Kemuning and Kemuning Greenville have an interest in the judicial review proceedings but she was wrong when she held that MAIS has no interest in the matter.

[115] It is my judgment that MAIS ought to have been given leave to intervene in the judicial review proceedings in order to support the decision of Majlis Bandaraya Shah Alam to set aside the 13.54 acres of land for the Muslim burial ground. MAIS's intervention is also important in order to ensure that the Shariah High Court proceedings at Shah Alam for, inter alia, a declaration that the 13.54 acres of land is a *wakaf* land and that it be registered under Enakmen Wakaf (Negeri Selangor) 1999 will not be rendered otiose.

[116] In *Latifah bt Mat Zin v Rosmawati Sharibun & Anor* [2007] 5 MLJ 101, Abdul Hamid Mohamed FCJ (now the Chief Justice of Malaysia) writing for the Federal Court on the issue of conflict of jurisdiction had this to say at p 124 of the report and that is a reflection of the current law and I adopt it here vigorously:

> At least, as far as the instant appeal is concerned, all the parties being Muslims, there is a way out even though it involves double proceedings, delay and more expenses.
>
> I do not think it is necessary for me to try to answer the questions as they are framed. It is sufficient and clearer that I answer the question that touches the crux of the case which disposes of the appeal in my own way and it is this: where a question arises as to whether a specific property forms part of the assets of an estate of a deceased person who is a Muslim in a petition for a letter of administration in the civil High Court, the answer to which depends on whether there was a gift inter vivos or not, that question shall be determined in accordance with the Islamic Law of gift inter vivos or 'hibah'. The determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, is within the jurisdiction of the Shariah Court and the civil court shall give effect to it in the grant of a letter of administration, and subsequently, in distributing the estate.

[117] On *wakaf*, I need to refer to ss 89–95 of the Enactment 2003. They are worded as follows:

> *Wakaf, Nazr* and Trusts
>
> 89 Notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of —
>
> (a) all *wakaf*, whether *wakaf am* or *wakaf khas*;

(b) all *nazr am*; and

(c) all trusts of every description creating any charitable trust for the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with *hukum Syarak*,

to the extent of any property affected by the *wakaf*, *nazr am* or trust and situated in the State of Selangor.

Vesting of *wakaf*, *nazr* and trust property in Majlis

90 All property subject to section 89 shall without any conveyance, assignment or transfer, and, in the case of immovable property, upon registration under the written law relating to land, vest in the Majlis, for the purpose of the *wakaf, nazr am* or trust affecting the property.

91 Restriction on creation of charitable trusts

(1) Whether or not made by way of will or death-bed gift, no *wakaf* or *nazr* made after commencement of this section and involving more than one-third of the property of the person making the *wakaf* or *nazr* shall be valid in respect of the excess beyond such one-third.

(2) Every *wakaf khas* or *nazr* made after the commencement of this section shall be null and void unless —

(a) His Royal Highness the Sultan, after consulting on the advice of the Majlis, has expressly sanctioned and validated the *wakaf khas* or *nazr*, or

(b) the *wakaf khas* or *nazr* made while the maker was seriously ill and the maker subsequently dies of such illness and was made in writing by an instrument executed by him and witnessed by two adult Muslim living in the same *kariah* masjid as the maker.

(3) This section shall not operate to render valid any will, death-bed gift, *wakaf* or *nazr* which is invalid under the provisions of *hukum Syarak*.

(4) Any *wakaf* or *nazr* which is valid in accordance with the previous Enactment shall remain valid for the purpose of this Enactment.

92 Income from *wakaf* and *nazr*

(1) The income received by the Majlis from a *wakaf khas* shall be applied by it in accordance with the lawful provisions of such *wakaf khas*.

(2) The income of every *wakaf khas* and of every *nazr am* shall be paid into and form part of the Baitulmal.

93 Capital of *wakaf* and *nazr*

(1) Subject to the subsections (2) and (3), the capital property and assets affected by any lawful *wakaf* or *nazr am* shall not form part of the Baitulmal, but shall be applied in pursuance of such *wakaf* or *nazr am* and held as segregated funds.

(2) If due to lapse of time or change of circumstances it is no longer possible beneficially to carry out the exact provisions of any *wakaf* or *nazr am*, the Majlis shall prepare a scheme for the application of the property and assets affected thereby in a manner as closely as may be analogous to that required by the terms of such *wakaf* or *nazr am*, and shall apply the property and assets accordingly.

(3) Notwithstanding subsection (2), the Majlis may, with the approval in writing of His Royal Highness the Sultan, direct that the property and assets referred to in subsection (2) shall be added to and form part of the Baitulmal.

(4) If the terms of any *wakaf* or *nazr am* are such that no method of application of the capital property or assets affected thereby is specified, or it is uncertain from such terms in what manner the capital property of assets should be applied, the Majlis may direct that such capital property and assets shall be added to and form part of the Baitulmal.

(5) All instruments creating, evidencing or affecting any *wakaf* or *nazr am*, together with any documents of title or other securities relating thereto, shall be held and retained by the Majlis.

Construction of instruments on *wakaf* or *nazr*

94 If in the opinion of the Majlis the meaning or effect of any instrument or declaration creating or affecting any *wakaf* or *nazr* is obscure or uncertain, the Majlis may refer the matter to the Court for its opinion as to the meaning or effect of the instrument or declaration, and shall act on any opinion so given by the Court.

Publication of list of *wakaf, nazr* and trust property

95 As soon as possible after the 31st day of December in every year the Majlis shall prepare, issue and publish in the Gazette a list of all properties, investments and assets vested in the Majlis, subject to any trust, *wakaf* or *nazr* and not forming part of the Baitulmal.

[118] I also need to refer to a book entitled *Wakf Laws and Administration In India* by S Athar Husain and S Khalid Rashid. There the learned authors at p 97 defined the word *wakf* (which is also spelt as *wakaf*) in this way:

The word 'wakf' literally means 'detention' and connotes tying up of property in perpetuity in a manner that no proprietary rights can be exercised over the corpus but only over the usufruct.

According to Abu Yusuf, *wakf* is the detention of a thing in the implied ownership of Almighty God in such a way that its profits may be applied for the benefit of human beings, and the dedication when once made, is absolute, so that the thing dedicated can neither be sold, nor given nor inherited (Ameer Ali, Vol I, (2nd Ed.)

153, citing Hedaya II (Arabic) p 887). The dedication becomes absolute and the right of the person making it gets extinguished by the mere fact of his declaring the dedication. Imam Mohammad, however, does not subscribe to this view. He thinks that the right of the *wakif* does not cease in the property until he has appointed a *mutawalli* and delivered in into his hands.

[119] And at p 98, the learned authors continued to write in this way:

The objects of dedication must be pious or charitable. Hence, the three dominant characteristics of '*wakf*' can be summarised as under:

(1) In the first instance, the motive must be religious; a merely secular motive would render the dedication a gift or a trust, but not a *wakf*.

(2) Secondly, it must be of a permanent nature. A pious gift which is not a permanent foundation may be a *Sadaqa* but cannot, in law, be termed as *wakf*.

(3) And lastly, the usufruct is to be utilised for the good of mankind.

[120] There is an interesting article entitled *Wakaf In Malaysia: Its Legal Evolution and Development* written by Nuarrual Hilal bin Md Dahlan and Dr Abdul Rani Kamarudin and reported in the Shariah Law Reports vide [2006] 1 ShLR 81. There, the learned authors wrote at p 87:

Wakaf being a matter concerning Muslim religion would be incompatible to English Law and equity. Instead the respective states' Religious Councils codified their *wakaf* law for their own respective administration. It may well be that prior to the appointment of the British Residents/Advisors, the administration of law including *wakaf* was not organised and systematic. It was probably after the British intervention that the law concerning matters on Islam including *wakaf* that there was a proper and systematic legal system. Hence, it is noted that before Malaysia's Independence in 1957, in Selangor, Kelantan, Terengganu and Pahang, the Islamic Law Courts (Shariah courts) of the Chief Kadhi (Judge) and the Courts of Kadhi were given power to hear and determine all actions in which all the parties were Muslims. *Wakaf* was also included in the jurisdiction of these courts. Based on the Rules and Enactment of the administration of Islamic law of these states, what is clear to us is that the religious council shall be the trustee of all the *wakaf* property. The function of the trustee included the administration and the due management of the *wakaf* for the benefit of the beneficiaries. What is disheartening is that, there is no record indicating that the Islamic Law court did adjudicate disputes concerning *wakaf*, thus, they would enlighten on issues pertaining to Islamic law courts' jurisdiction and the applicable laws. Nevertheless, it is submitted that in the event of any disputes on religious matters, including *wakaf*, the inevitable practice must have been that the Muslims, as a matter of course, would refer them to the Islamic jurists and experts for rulings. These experts would inevitably be guided by the Islamic legal texts, for examples, books written by the previous Islamic scholars

such as al-Ghazalli (1059-1111), al-Rafei (-1228), al-Nawawi (1233-1277), al-Isfihani (1106), al-Syirazi (1083), al-Asnawi (1305-1370), al-Subki (1326-1459) etc.

[121] Continuing at pp 93–95, the learned authors wrote:

Amendment to the Federal Constitution

Pursuant to cl 121(A) of the Federal Constitution, the civil court shall have no jurisdiction to try and decide matters within the jurisdiction of the Islamic law court. This new amendment was made with effect from 10 June 1988. However, to what extent does this clause actually apply?

The reason for having such an amendment is to allow the Islamic law court to carry out its function within the jurisdiction conferred by law to it without any interference from the civil courts as evident in quite a number of cases such as *Myriam v Ariff* [1971] 1 MLJ 265,; *Commissioners for Religious Affairs Trengganu & Ors v Tengku Mariam* [1969] 1 MLJ 110, *Ainan bin Mahmud v Syed Abu Bakar* [1939] MLJ 209, *Nafsiah v Abdul Majid* [1969] 2 MLJ 174, *Roberts v Ummi Kalthom* [1966] 1 MLJ 163, *Boto' binti Taha v Jaafar bin Muhammad* [1985] 2 MLJ 98, *Re Syed Shaik Alkaff* [1923] 2 MC 38 and in *Re Alsagoff's Trust* [1956] MLJ 244. Let us further see the chronology of cases decided in order to observe and comment on the facts and lines of reasoning adopted. The cases on *wakaf*, can be classified into two (2) epoches:

(1) Cases after the enforcement of Federal Constitution (FC) but before the constitutional amendment on art 121; and,

(2) Cases after the constitutional amendment on art 121 viz art 121(1A).

Cases after the enforcement of Federal Constitution but before Constitutional Amendment on art 121

The reported cases that dealt with *wakaf* were as follows:

(1) *Commissioner of Religious Affairs, Trengganu v Tengku Mariam* [1970] 1 MLJ 222;

(2) *Haji Embong bin Ibrahim & Ors v Tengku Nik Maimunah Hajjah bt Almarhum Sultan Zainal Abidin & Anor* [1980] 1 MLJ 286;

(3) *Re Dato Bentara Luar Decd Haji Yahya bin Yusof & Anor v Hassan bin Othman & Anor* [1982] 2 MLJ 264;

(4) *Tengku Abdul Kadir bin Tengku Chik & Anor v Religious Council of Kelantan* JH Nov [1995] Jld X Bhg 1;

(5) *Sahul Hamid & Anor v Negri Sembilan Religious Council & Ors* JH [1417] H Jilid X Bhg II; and,

(6) *Haji Hassan v Nik Abdullah & Ors* [1969] 2 JH 124.

[122] The learned authors then referred to the case of *Shaik Zolkaffily bin*

Shaik Natar & Ors v Religious Council of Penang [1997] 3 MLJ 281, which went on appeal to the Court of Appeal and the appeal by the appellant was rejected — see *Majlis Ugama Islam Pulau Pinang dan Seberang Perai lwn Shaik Zolkaffily bin Shaik Natar dan lain-lain* [2002] 4 MLJ 130. Finally, the case went up to the Federal Court and the Federal Court reversed the decisions of both the High Court and the Court of Appeal – see *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705.

[123] Mohammad Tahir Sabit wrote an article entitled *The Concept and Objective of WAQF* which is reported in the Shariah Law Reports vide [2004] 1 ShLR 10, at pp 12–13, the learned author sets out the meaning of *wakaf* in this way:

> The meaning and definition of *waqf*
>
> The familiar term, for trusts, in the principle texts of Shariah, is *sadaqah* and *habs*. Nevertheless, jurists also use *waqf*, which, sometime, is written as *wakaf* or *wakap* in South East Asia. In Northern Africa the jurists still use *habs* or *tasbil* for the same concept. The Shi'i scholars however differentiate between *waqf* and *habs* — both charitable but have slightly different implication. See Yahya bin Sa'id al-Hilli, al-Jami'li al-Shara'i, Qum: Musassah al-Shuhada' al-'Ilmiyyah, 1405, AH, p 368.
>
> Literally, both *waqf* and *habs* mean: 'to prevent', or 'to restrain'. Legally they mean 'to protect something, by preventing it from becoming the property of a third person.' The classical definition of *waqf* is given by Imam Abu Hanifah saying 'the appropriation of any particular thing in such a way that the founder's right in it shall continue and the advantage of it go to some charitable object'. This definition however is not preferred by his disciples ie, Abu Yosuf and Mouhammad as well as jurists in Shafi'i, Hanbali and Imami schools (see Abu Zahrah, Muhadarat, pp 39–40, 62–69, for Shafi'ies views see al-Sharbini, Mughni al-Muhtaj, kitab *al-waqf*, for hanbalies, see ibn Qudamah, *al-Mughni*, Vol 6 p 185). The point of disagreement is the retention of the title by the donor which gives him the discretion to revoke the trust anytime during his lifetime, as he pleases, provided the trust is not effective after the death of the donor or as a result of a decision by a competent court.
>
> The majority of jurists agree that the donor has no title in the trust as the property, after promise or after promise and possession, becomes God's property (ie, ownerless), and hence the donor has neither title in the property nor power to revoke the trust. Abu Zahrah defined *waqf* as 'the prevention of a benefit-generating estate from corporal disposal but using its usufruct and benefit in charity, intended so at the time of creation and thereafter.' Abu Zahrah's definition of *waqf* is generic; he includes the fundamental ideas proposed by various jurists, and still maintaining that the donation must be of immoveable property which gives the impression that the given *waqf* should be in perpetuity. This line of reasoning, after due consideration is given to the practice during and after (the) lifetime of the Prophet (pbuh), is perhaps too restrictive and for practical reasons has resulted in stagnation of *waqf* properties due to the lack of finance to

develop such properties. The sound and very recent definition of the *waqf* is 'the holding of certain property and preserving it for the confined benefit of certain philanthropy and prohibiting any use or disposition of it outside that specific objective (Munzer Qahf, see also his al-Waqf al-Islami, Tatawurruh, Idaratuh, Tnmiyyatuh, Damiscus & Beirut: Dar al-Fikr, 2000, p 62)'. This last definition, for a good reason, widens the idea of *waqf* to include almost all those elements which were intentionally omitted by some classic jurists in their concept and definition of *waqf*: this will include not only immovable property to be the subject of the trust, it also will include the donation of movable property as well usufruct and cash. The genius of this definition is that it concentrates on the recurrence of the benefit generated by the donated property, which need not be immovable property. This interpretation of *waqf* is in line with the various types of hubs or *waqf* practiced during the lifetime of the Prophet (pbuh) and the four righteous Caliphs. Extending, furthermore, the scope of *waqf* will result in attraction of a variety of means and funds; therefore, enabling the contemporary Islamic trust institutions to finance the development of stagnant properties themselves and contribute to the welfare of the society generously. One may not argue that such an opinion blurs the line between *waqf* and *sadaqah*, for every *waqf* is a type of *sadaqah*. They have certain similarities and differences which still can be maintained; even one accepts the definition provided by Qahf.

[124] On the constituents of *wakaf*, the learned author has this to say at pp 15–18:

The constituents of *waqf*

A valid *waqf* is concluded if the general or special conditions on disposal of the property by the owner and the object which form the subject matter of the *waqf*, as well as the beneficiaries thereto, are satisfied. They are as follows:

(1) The donor

Since *waqf*, by nature, is an act of donation or unilateral transfer, it comes under general concept of gifts (*tabaru'at*). In addition to the conditions applied to gifts, *waqf* is a special form of disposal of property that allows the owner to freeze the property from subsequent transfer, disposal, and transmission to others. Such a power of the owner is indefeasible and cannot be revoked by anyone including the state and court except according to the conditions expressly provided by the donor in the document of the *waqf*. Jurists agree that the words of a donor are the words of law, therefore, the inherent general jurisdiction of courts to validate *waqf* or do otherwise, is basically limited to the application of the general principles of ownership, that vest in the owner the powers of disposal especially in respect of gifts, his capability to use such powers, and the type of the property and the beneficiary thereto. The specific jurisdiction of courts is limited to the discovery of the intention of the donor, and the objective that is that it should include some form of charity. Therefore, as long as a document that bears testimony to the donation is signed by an owner or his authorised agent who is legally

competent (major, sane, sober) and is free from other legal restrictions because of bankruptcy, insolvency, idiotic or wasteful expenditure, and illness that results in death, such a document will be considered valid and unchallengeable provided the maker of the donation has complied to other conditions of law. The basic rule here is that waqf is a sort of gift to others which by nature makes the donor lose his property; thus according to the general principle of gifts, the above categories of owners, as well as the guardian and even the court, have no jurisdiction and power to deal with the property in a manner that is harmful to the incompetent owners.

(2) The subject matter of *waqf*

The conditions imposed, by the majority of hanafis who follow Muhammad, on the subject matter of the *waqf* is that it shall exist in perpetuity (eg, land, fixture, tools and other things used for land or mentioned expressly in the legal texts, or anything that custom accepts it as the subject matter of *waqf* like books). The Shafi'i and Hanbali schools allow any property which can be used and its corpus remains intact. The Malikis allow any thing that can be owned provided that the donor is the owner and there is no restraint on dealing such as in the case of pledge, charge and lease; for the rights and interests of others prevent the owner to deal with his property without the consent of the interest-holders.

The perpetuity of the *waqf* property

The tradition, it appears, about the land of Umar ibn Khattab in Kaybar, that 'if you like, you could retain its corpus and give its produces in charity (Sahih Muslim, kitab al-wasiyyah, bab al-waqf, hadith 1632, p 15)' has been taken by the majority of classical jurists as a source that relates to the idea of Islamic trusts. In Maliki school this is however not the case for they seem to have also relied on the other hadiths of the prophet as well as the practice of his companions. As mentioned early (sic) (earlier) the definition of *waqf* have not reached a consensus on the nature of the property donated to a trust. According to Imam Muhammad and his followers in the Hanafi school, the donated property shall exist perpetually. The Hanafies do not allow movable property as the subject matter of *waqf* except fixtures and concomitants, such as buildings, trees and those which are essential for maintenance and development of immovable property as animals, workers, and tools for farming, or tools and animals used for military purposes. Other jurists of the majority allow the subject matter of the waqf to be either movable or immovable that could be sold or being used while it is still intact such as estate, tools, furniture and the like, as long as it can be used and its corpus remains intact without any damage. The Malikies, however, allow any property that could be owned, including property that may not be considered as the subject of sale and purchase agreements eg, the skin of dogs. They allow cash as well, and go a step further by allowing the rental of houses or any other property to be given as *waqf*. The donation of cash (darahim/dananir), movable property, according to the recent opinion in the Hanafi school is permissible too. Ibn Abidin thought that the custom and practice in Muslim Roman states who donate cash to charitable endowment come under the opinion of Imam Muhammad who allowed the subject matter

of waqf to be any movable property if such is the general practice of the community. What one observes here is that as long as the subject matter can constructively exist in perpetuity it can be donated in a valid trust. It is therefore thought that one can donate his property in perpetuity or for a limited time. Contemporary jurists prefer Maliki view for it is helpful not only in liquidation of *waqf* assets but also in improving the wellbeing of the society by attracting a greater participation of the public and hence paving way for better service to the welfare of the needy. The current practice, by *waqf* institutions, of accepting cash that is kept in investment accounts of Islamic Banks, shares, stocks, and investment in bonds and securities, the return of which is spent on charities, is considered in line with the above principles.

The effect of perpetuity

The primary concept and objective of the *waqf* reveal that irrespective of the nature of the property of the *waqf*, as being movable or immovable, *waqf* is in perpetuity, that it shall continue. The continuation of a *waqf* is possible only if it is maintained all the times; to some jurists this is the main obligation of the administrator of the *waqf*. It is, therefore, necessary to spend its revenue on its revival, revitalization and development so that it could contribute to the welfare of the coming generations. This spending is mandatory, as there would be no perpetuity if the property were left to ruin. A shortcoming inherent in the concept of perpetuity is that the majority of the *waqf* property is real estate which by nature is non-liquid. In order to save a *waqf*, early jurists have resorted to the exchange of estates, for very often the majority of the *waqf* institutions have little cash on their hand, thus insufficient to develop the land or even to maintain the real estate. To solve this problem and encourage charitable spirit among people it is proposed by Qahf that new forms of subject matter, in addition to realty, such as chattels, tools, cash, labor, usufruct, equities and shares, and services should be accepted even though such a donation is for shorter period of time as long as the owner wishes to part with perpetually. This is so because *waqf* funds not only need the real property but also labor as well as an impale amount of cash in order to pay for the work done on maintenance, change or exchange of the *waqf* property and also equipments for development and management of the real property. In order to make the donated items perpetual, and thus conform to the generally accepted concept of *waqf*, one only needs to amortize the income of such donations, as practiced by companies, or upgrade the tools and chattels from time to time.

Consequent to the above explanation, based on the subject matter, waqf may be classified as perpetual and temporary. A perpetual *waqf* however should be valid only if the subject matter is perpetual or amortized, the donor intends so, and the objective of the waqf is unending.

[125] Section 2(1) of the Enactment 2003 carries the definition of the words '*wakaf*', '*wakaf am*', and '*wakaf khas*' and I shall now reproduce them:

wakaf means any property from which its benefit or interest may be enjoyed for any charitable purpose whether as *wakaf am* or *wakaf khas* in accordance with hukum Syarak, but does not include a trust which is defined under the Trustee Act 1949 [Act 208];

wakaf am means a *wakaf* that is created for a general charitable purpose in accordance with hukum Syarak; and

wakaf khas means a *wakaf* that is created for a specified charitable purpose in accordance with hukum Syarak.

[126] All these articles on *wakaf* and the definition of that word as set out in s 2(1) of the Enactment 2003 serve as a reminder that *wakaf* is not an easy subject to handle bearing in mind that it is a live issue before the civil High Court at Shah Alam and before the Shariah High Court at Shah Alam The views of the 'ulamas' or Muslim scholars on '*wakaf*' would greatly assist the civil High Court at Shah Alam to arrive at a just decision in the judicial review proceedings and this can only be achieved if MAIS is allowed to intervene. It is an affront to justice if MAIS is not allowed to intervene. As a trustee of the *wakaf* land — referring to the 13.54 acres of land set aside for Muslim burial ground, MAIS must be allowed to intervene. Section 89 of the Enactment 2003 stipulates that MAIS shall be the sole trustee of all *wakaf*s. What happens to the 13.54 acres of land designated as a Muslim burial ground and was active before the civil High Court at Shah Alam injuncted it, must be of prime concern to MAIS. His Royal Highness the Sultan of Selangor must be advised correctly by MAIS and MAIS can only do so effectively if it is allowed to intervene. Section 3 of the Enactment 2003 enacts as follows:

Saving of prerogative

3 Save as expressly provided in this Enactment, nothing contained in this Enactment shall derogate from or affect the rights and powers of His Royal Highness the Sultan as the Head of the Religion of Islam in the State of Selangor as declared and set forth in the Laws of the Constitution of the State of Selangor, 1959.

[127] Applying *Latifah Mat Zin*'s case, the issue of *wakaf* land should be heard by the Shariah High Court at Shah Alam first and whatever the outcome the civil High Court at Shah Alam should give effect to it accordingly.

[128] I will now say something about the judicial review proceedings.

[129] Bong and the 146 others are challenging the decision of Majlis

Bandaraya Shah Alam — a public authority, by way of a judicial review under the new O 53 of the RHC vide PU(A) 342/2000 with effect from 21 September 2000.

[130] Judicial review or certiorari is becoming popular with litigants who are not satisfied with the decision or determination of a public authority and seek to quash it for some reason or other.

[131] Academic writers say that in a judicial review proceeding, the function of the court is to scrutinise the decision-making process and not to question the decision itself. And that when the court quashes the decision or determination, the court will remit the case back to the original decision maker to reconsider the matter. Now, this statement of the law is the correct legal positions in England, Hong Kong and hitherto Malaysia. They are the accepted legal principles bandied around by lawyers and academic writers alike.

[132] While England and Hong Kong jealously guarding these principles of law, we in Malaysia have advanced by leaps and bounds. The current legal position in Malaysia would be this. We do not stop at quashing the decision and remitting it back to the decision maker. We will instead assume the jurisdiction and proceed further to grant the consequential relief.

[133] There are passages in the judgment of the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC that must be reproduced to show the current legal position in Malaysia in regard to judicial review proceedings. Eusoff Chin, Chief Justice, delivering a separate judgment had this to say at p 183 of the report:

> Similarly, in *Minister of Labour, Malaysia v National Union of Journalists, Malaysia* [1991] 1 MLJ 24, where the Minister had refused to refer a trade dispute to the Industrial Court under s 26(2), the Supreme Court when upholding the decision of the High Court granting certiorari to quash the decision of the Minister, did not order the Minister to reconsider the matter de novo but instead arrogated itself the powers of the Minister and granted the relief to the workman by directing the Minister to refer the trade dispute to the Industrial Court.
>
> It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in certiorari proceedings, and I find that where the particular facts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.
>
> MP Jain and SN Jain in *Principles of Administrative Law* (4th Ed, 1993) at pp 547 and 548 stated:

> In recent years the courts have not looked upon their task in such a mechanical manner and have tendered to mould their relief according to the exigency of the situation. They have tried to tailor the relief in accordance with the demands of justice in the circumstances of the specific case, lay down guidelines, go into the merits, and even at times to dilute the logical consequences of their own ruling on the law.
>
> In a few cases the Supreme Court, while quashing a disciplinary order on account of failure of natural justice, prohibited a fresh hearing by the authority and ordered reinstatement. Recently, in *AL Kalra v Project & Equipment Corp of India Ltd* AIR 1984 SC 1361, the court quashed the dismissal order and ordered reinstatement …. In *Grindlays Bank v ITO* AIR 1980 SC 656, the court not only quashed the assessment order but also issued directions to make a fresh assessment in the circumstances of the case.
>
> There are a number of instances where the Supreme Court has played this kind of affirmative role. In *Gujarat Steel Tubes v Mazdoor Sabha* AIR 1980 SC 1896, the arbitrator's Award in a labour dispute having been found to be invalid as it suffered from a fundamental flaw, the court itself proceeded to fashion the relief to be given to the discharged workers keeping in view the dictum that 'law is no dogmatics but pragmatics'. In *Azad Rickshaw Pullars Union v Punjab* AIR 1981 SC 14, the court itself framed a scheme so that the provisions of a statute meant for the benefit of rickshaw pullers could be made workable …

As earlier stated, the claimant is 51 years old and has been jobless for the last seven years. Owing to his unemployment, he and his family with school-going children are suffering immense hardship. Should we remit this case back to the Industrial Court? To do this will certainly involve continued and prolonged litigation which will do great harm and injustice to the claimant, and were he to die, his claim will abate as was held in *Thien Tham Sang v United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97, and this will result in his family suffering grave injustice.

[134] Continuing further at pp 184–185 of the report, Eusoff Chin, Chief Justice, had this to say:

> l am, therefore, of the view that based on the facts on record, this is a fit and proper case where the jurisdiction of the court should not end with the quashing of the award.
>
> The High Court jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of certiorari was developed and came to be granted by the courts in England. Of course if the application for certiorari is dismissed, that ends the matter. But if the application is allowed, the court has surely to mould the order. If we were to merely grant certiorari to quash the Award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave injustice being caused to the claimant.
>
> Having carefully considered the question, I am not persuaded by the submission of the learned counsel for the society that we should remit the case to the Industrial Court with a direction to make the necessary consequential orders. As far as

possible the anxiety and endeavour of the court should be to remedy an injustice when it is brought to its attention. On the facts of the case before us, to remit this matter back to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demands that to avoid further delay and expense, we determine the consequential relief rather than remitting the case to the Industrial Court for that purpose.

[135] Writing a separate judgment in *R Rama Chandran*, Edgar Joseph Jr FCJ had this to say at pp 186–187 of the report:

lt is often said that judicial review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.

[136] Continuing at pp 190–191 of *R Rama Chandran*, Edgar Joseph Jr FCJ aptly said:

The next question to be addressed is whether the extent of our powers in review jurisdiction includes the power to make consequential orders in favour of the Employee instead of remitting the case to the Industrial Court to do so.

[137] And at p 196 of *R Rama Chandran*, Edgar Joseph Jr FCJ succinctly said:

There are dicta in a wealth of Indian case law, the effect of which is, that the powers of the High Court conferred by art 226 are not limited to issuing prerogative writs but extends so far as to enable the court to issue any appropriate order or direction. (See for example *Jashingbhai v Dist Magistrate, Ahmedabad* AIR 1950 Bom 363, [1950] 52 Bom LR 544; *Ramcharan Lal v The State of UP* [1953] 1 All 251, AIR 1952 All 752; *Prabhawati Devi v Dist Magistrate* AIR 1952 All 836; *Chhotabhai Jethabhai Patel & Co v Union* [1952] Nag 156; *Amardas v Pepsu* [1953] Pep 63; *Krishnankutty v Trav Cochin* AIR 1951 Tr C 197; *B Parraju v Gen Manager, BN Rly* AIR 1952 Cal 610.) Though these dicta are in the nature of general observations, they cannot be disregarded out of hand.

There are also India Supreme Court authorities which strongly support the proposition that the power of the courts there, in the field of Public Law remedies, is not limited, as in England, but much wider, so much so, that in certain circumstances, they have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. (See for example, *State of Madhya Pradesh v Bhailal Bhai* AIR 1964 SC 1006; *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81; *Behari Lal Baldeo Prasad v Commissioner Jhansi Division* [1967] 63 ITR 555; *Hindustan Steel Ltd Rourkela v Roy AK* AIR 1970 SC 1401 at p 1407; *Variety Emporium v Mohd Ibrahim* AIR 1985 SC 207 at p 210).

[138] Just like the Indian courts, the Malaysian courts too have the jurisdiction not only to look at the form but also at the substance of the decision and to reconsider the case on its merits. Our Malaysian courts do not stop at merely quashing the decision and remitting it, they have moved forward in tandem with the socio-economic development of the country and they have assumed the jurisdiction in order to grant consequential relief. In doing so, I venture to say that we are now developing our own brand of 'common law'.

[139] When dealing with judicial review proceedings, one must refer to the new O 53 of the RHC, the Specific Relief Act 1950 (Act 137) and para 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) (Revised 1972). These legal provisions must be scrutinised together with the factual matrix of the case. Indeed Gopal Sri Ram JCA writing a separate judgment for this court in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 CA rightly said at p 515 of the report that in judicial review proceedings, the court was entitled to undertake 'a critical scrutiny of the factual matrix'. Thus, in order to fulfil this onerous duty, all the parties must be before the court. It follows therefore that MAIS should be allowed to intervene so that all the issues will be ventilated by the civil High Court at Shah Alam, once and for all.

CONCLUSION

[140] What is convenient and what is just must enter into the equation when one is confronted with an application to intervene. In the final analysis, MAIS will play a prominent role in that it will cushion the sensitivity of the case in the event that the civil High Court at Shah Alam makes an order that the bodies of the deceased Muslims who have been buried in the 13.54 acres of land be exhumed. And if that happens, MAIS as a party to the judicial review proceedings will be in a better position to advise His Royal Highness the Sultan of Selangor accordingly.

[141] Looking at the affidavits, one can safely conclude that MAIS should be allowed to intervene. A lot of the facts narrated in these affidavits, and which have been reproduced in this judgment, can only be made known to the civil High Court at Shah Alam if MAIS is allowed to intervene. Once MAIS has intervened, all the facts will be unfolded. Isn't that what justice is all about? I wonder why Bong and the 146 others are objecting to MAIS's application to intervene in the judicial review proceedings. Are they afraid that the truth will prevail and that the truth will show that MAIS ought to be allowed to intervene?

[142] I must reiterate that the issue of the *wakaf* land must first be resolved by the Shariah High Court at Shah Alam and, whatever the decision may be, it should bind the civil High Court at Shah Alam (*Latifah Mat Zin*'s case) accordingly.

[143] In my judgment, MAIS's intervention is inevitable. The facts and the law warrant it. MAIS has a legal interest to intervene.

[144] For the reasons adumbrated above, I must allow the appeal with costs here and below. The order of the learned High Court judge is set aside. The deposit should be returned to MAIS who is the appellant in this appeal.

[145] As a matter of courtesy, I have circulated this dissenting judgment to Raus Sharif, JCA and Hasan Lah, JCA who sat together with me in this panel.

Appeal dismissed with costs.

Reported by Sally Kee